

1 MR. ZAUNER: And if we determine that they don't
2 have relevant information, I don't know whether it would be
3 necessary to advise you of their identity. If they do, we
4 certainly would -- we have no objection to doing so.

5 MR. HONIG: To the best of my knowledge, Your Honor,
6 there's only been one trial of an EEO issue where there was a
7 public witness and that was the federal broadcasting trial in
8 -- it took place in 1977. There was one public witness, it
9 happened that I was that witness. The Bureau --

10 JUDGE STEINBERG: Was that the one in Rochester?

11 MR. HONIG: That was the one in Rochester.

12 JUDGE STEINBERG: With Mr. Kilbain?

13 MR. HONIG: That's right, and he had left and Judge
14 Chachkin was Bureau counsel at that time and he put me on.
15 And I can tell you the testimony was very short and there was
16 intensive cross-examination and ultimately none of it meant
17 much anyway.

18 JUDGE STEINBERG: Okay. We'll revisit that later.
19 But I mean, if someone contacts the Bureau and the Bureau
20 interviews them and determines that they don't have relevant
21 and material information, why would you need to know that?

22 MS. SCHMELTZER: Well, I mean unless we might
23 reasonably differ about whether the information is relevant or
24 not, in that event we would like to know their identity.

25 JUDGE STEINBERG: Okay. I think that's fair.

1 MR. ZAUNER: So, if anybody contacts us about
2 testifying we have to inform opposing counsel of their
3 identity? Suppose a person asks that we not --

4 JUDGE STEINBERG: If they request confidentiality I
5 think you have to honor it. I think you would have to honor a
6 request for confidentiality. But if their testimony is going
7 to be presented, obviously they can't maintain any kind of
8 confidentiality.

9 MR. ZAUNER: Absolutely. I agree with that. But I
10 guess part of my concern is if we're going to have to identify
11 people who simply call in and who, you know, we have a
12 conversation with and we ascertain they have no information
13 and we're not proposing to introduce them as witnesses, it
14 seems to me that this is a process that all counsel go through
15 in the preparation of a case. They interview many people,
16 they speak to many people, they determine that some of them
17 are not going to be witnesses and they don't go and identify
18 those persons to their opponents and I don't see why the
19 Bureau should have to go through this process of identifying
20 to the other parties in this proceeding people who happen to
21 call and have what we determine to be no relevant information
22 and that we're not going to call as witnesses.

23 MS. SCHMELTZER: To the extent that those people
24 might have knowledge that could conceivably be helpful to the
25 church we would want to know the identities of those

1 individuals.

2 MR. ZAUNER: And I presume that Mr. Honig would want
3 to know --

4 JUDGE STEINBERG: Of course.

5 MR. ZAUNER: -- the converse.

6 MR. HONIG: You bet we would.

7 MR. ZAUNER: And that puts us in a position then we
8 identify everybody who calls both sides?

9 JUDGE STEINBERG: I think that -- somebody calls
10 you, obviously if they say this is so-and-so, I listen to the
11 station, what's going on, can I come testify?

12 MR. ZAUNER: Well then I'd like to make a motion
13 that the other parties inform the Bureau of everybody that
14 they examine with regard to these issues whether or not they
15 decide they're going to use them for the same reason --

16 JUDGE STEINBERG: That they examine or that call
17 them?

18 MR. ZAUNER: -- they have to say so that the Bureau
19 can determine whether their information is relevant or not.

20 JUDGE STEINBERG: It's a good point.

21 MR. HONIG: Your Honor, there is an FCC/EEOC joint
22 agreement from 1978 and one issue the purpose of which was to
23 try to ensure coordination between the agencies where there is
24 to some extent common jurisdiction. My construction of that
25 agreement -- and there is no case on it because this has never

1 | come up but I'd be willing to brief it if you think it
2 | necessary -- is that in instances where a witness calls for
3 | example the Bureau and says for example I used to work with
4 | the stations or my spouse used to work at the stations and I
5 | have information that would be important but it's a small
6 | industry and I'm concerned about being blackballed in the
7 | industry. And this often happens in civil rights cases even
8 | where a defendant or a respondent would have no intention
9 | whatsoever of doing anything improper. The witnesses
10 | nonetheless fear it because it does happen. The EEOC's rules
11 | contemplate this and allow for, for example, a John Doe or
12 | Jane Doe person to come forward with their identity protected.
13 | I know that it's Mr. X and Ms. X so there would have to be
14 | some care. But it is done. My reading of the joint agreement
15 | is that those procedures would be at least a good source of
16 | the way the Commission ought to construe its own law because
17 | it's not spoken of in the Commission's rules. What often
18 | happens in federal civil rights litigation after it goes
19 | beyond the EEOC is that individuals come forward and they want
20 | to be protected for example from their employer not wanting
21 | them to come forward and testify in a civil rights case. Many
22 | employers don't like to lose people away and especially when
23 | it's a civil rights case, even if it's not the same employer.

24 | MS. SCHMELTZER: Your Honor --

25 | MR. HONIG: Often what we have to do in those cases

1 is to protect them by asking that they be -- that they testify
2 under subpoena so it's quite likely that I'll be requesting
3 subpoenas.

4 MS. SCHMELTZER: Your Honor, there's absolutely no
5 allegation that we have done anything of the nature that
6 Mr. Honig is suggesting and this is not a federal civil rights
7 case.

8 JUDGE STEINBERG: Let me just --

9 MR. ZAUNER: Your Honor, this isn't even relevant to
10 the topic we're discussing.

11 JUDGE STEINBERG: Okay. Let me just say you request
12 subpoenas and if you show good cause for getting the people,
13 I'll sign the subpoenas. I have no problem with that. I
14 don't want people coming up and testifying my name is Jane
15 Doe. If the church doesn't know what their name is how can
16 they do research? Jane Doe might have a giant ax to grind and
17 if the church doesn't know Jane Doe's real name -- but then
18 you can give Jane Doe's real name to the church under seal.
19 But if people want to come and testify they ought to come and
20 testify and use their own names.

21 MR. HONIG: Let me emphasize the purpose of --

22 JUDGE STEINBERG: Okay, but let's get back to
23 Mr. Zauner's point. Mr. Zauner's point was basically if
24 somebody calls him or writes him and he determines that they
25 don't have evidence relevant and material to the issues, he

1 doesn't want to have to turn the names over to the other two.

2 MS. SCHMELTZER: I understand his point. If the
3 person is going to be testifying on behalf of the Bureau we
4 would want to know who it is.

5 JUDGE STEINBERG: Okay. So let's leave it that way.
6 Otherwise, I think if someone calls Mrs. Schmeltzer and says
7 blah, blah, blah and she says no, I don't want to put this
8 witness on, Mr. Zauner has a very valid point, why shouldn't
9 that name be turned over and exchanged? Let's not get into
10 that. Mrs. Schmeltzer is happy, Mr. Zauner is happy and Mr.
11 Honig wants to say something.

12 MR. HONIG: Almost happy. I have no problem with
13 not receiving the names of persons who Mr. Zauner determines
14 have no relevant and material evidence. However, if someone
15 has evidence which is relevant but Mr. Zauner does not believe
16 it to be sufficiently material to involve the Bureau, I might
17 nonetheless look at the same evidence and believe it to be
18 material and I would want to know who the person is.

19 JUDGE STEINBERG: I mean, where are going to draw
20 the lines? The rule says call the Bureau. I'm going to leave
21 it in Mr. Zauner's hands and Ms. Laden's hands and I trust
22 their judgment, I have to trust their judgment, the Commission
23 trusts their judgment. And somebody's got to make the
24 judgment and the public notice rule seems to say that judgment
25 is going to be made by the FCC and in this case by Mr. Zauner.

1 Anything more on that? Good, nothing more on that. Let's go
2 off the record and talk about dates.

3 (Whereupon, off the record.)

4 (Whereupon, on the record.)

5 JUDGE STEINBERG: Back on the record. And we agreed
6 to the following procedural dates. Completion of all
7 discovery, May 20th, 1994. Exchange of affirmative written
8 direct case exhibits, May 27th, 1994. Admissions session and
9 notification of witnesses desired for cross-examination will
10 commence on June 9th, 1994, at 9:30 a.m. in the Commission's
11 Washington, D.C. offices. Exchange of written rebuttal case
12 exhibits, June 16th, 1994, and those will be hand-served to
13 the parties and to myself, or to me, whatever the right word
14 is. Commencement of the hearing will be June 20th, 1994, at
15 9:30 a.m., in Clayton, Missouri or vicinity. There will be an
16 order issued once we secure a courtroom notifying everybody as
17 to where the hearing will be, the address. Everybody agree to
18 those dates? Ms. Schmeltzer?

19 MS. SCHMELTZER: Yes.

20 JUDGE STEINBERG: Mr. Honig?

21 MR. HONIG: Yes.

22 JUDGE STEINBERG: And Mr. Zauner?

23 MR. ZAUNER: Yes.

24 JUDGE STEINBERG: Okay. Anything further we need to
25 do today? Okay. Then we'll conclude the conference and I'll

1 | issue an order setting forth these dates. And if you need
2 | another conference, call me up, let me know. I'll try to talk
3 | you out of it and then if I can't then we'll schedule it. If
4 | you want informal rulings or formal rulings, perhaps we could
5 | do it by conference call too and then I can confirm them in
6 | writing and that might save some time. If you want to come in
7 | here and meet informally without a reporter, I don't mean to
8 | cut into your income, but you know, without a reporter to see
9 | if we can work things out and then I can put something in
10 | writing confirming it in writing, we can do that, keep the
11 | case moving. Okay. So, with that we'll conclude for today
12 | and we'll be in recess until -- either until the admissions
13 | session or until I have another conference. Thank you.

14 | MS. SCHMELTZER: Thank you.

15 | MR. HONIG: Thank you, Your Honor.

16 | (Whereupon, off the record at 10:30 a.m., on
17 | March 16, 1994.)
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CERTIFICATE OF REPORTER, TRANSCRIBER, AND PROOFREADER

IN RE APPLICATIONS OF CLAYTON, MISSOURI

Name

MM DOCKET NO. 94-10

Docket No.

WASHINGTON, D.C.

Place

MARCH 16, 1994

Date

We, the undersigned, do hereby certify that the foregoing pages, numbers 1 through 57, inclusive, are the true, accurate and complete transcript prepared from the reporting by ALICE WEHNER in attendance at the above identified proceeding, in accordance with applicable provisions of the current Federal Communications Commission's professional verbatim reporting and transcription Statement of Work and have verified the accuracy of the transcript by (1) comparing the typewritten transcript against the reporting or recording accomplished at the proceeding and (2) comparing the final proofed typewritten transcript against the reporting or recording accomplished at the proceeding.

March 23, 1994

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